85-1853

No. _____

Supreme Court, U.S.
FILED
MAY 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BERNARD LEE HAMILTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
STEVE WHITE,
Chief Assistant Attorney
General
HARLEY D. MAYFIELD,
Assistant Attorney General
PAT ZAHAROPOULOS,
Deputy Attorney General
JAY M. BLOOM,
Supervising Deputy Attorney
General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7857

Attorneys for Petitioner

HOLD

QUESTION PRESENTED

Whether a jury finding a felony-murder special circumstance without a finding on intent to kill required reversal by the California Supreme Court under the rule espoused in Connecticut v. Johnson (1983) 460 U.S. 73 when the special circumstance finding cannot be deemed a guilt or innocence determination in light of Cabana v. Bullock (1986) 474 U.S. ___, [88 L.Ed.2d 704].

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THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BERNARD LEE HAMILTON,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of California, requests this Court to issue a writ of certiorari to review the judgment and opinion of the California Supreme Court dated December 31, 1985, affirming respondent's conviction but setting aside the special circumstances and the death penalty. A petition for

rehearing was denied on March 13, 1986, and remittitur issued on that date.

OPINIONS BELOW

The opinion of the California Supreme Court affirming the judgment of guilt but reversing the death penalty (People v. Hamilton (1985) 41 Cal.3d 408.) appears as Appendix A of this petition. A copy of the California Supreme Court's order denying the petition for rehearing appears as Appendix B.

JURISDICTION

The judgment of the California Supreme Court was filed on December 31, 1985. A timely petition for rehearing was denied on March 13, 1986. This petition is filed within 60 days of that date and is therefore timely. This Court's jurisdiction is invoked under 28 U.S.C., section 1257 (3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendments Eight and Fourteen.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County on July 11, 1979, respondent was charged in four felony counts as follows: count I, vehicular burglary (Pen. Code, § 459); count II, robbery (Pen. Code, § 211); count III, kidnapping (Pen. Code, § 207); and count IV, murder under special circumstances. Allegations contended respondent murdered Eleanor Buchanan during the commission of a robbery, kidnapping and/or burglary (Cal. Pen. Code, § 190.2). (CT 45-46.)[1/]

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1. "CT" refers to the clerk's transcript and "RT" refers to the reporter's transcript of the trial.

The information further alleged two prior felony convictions (a 1972 forgery and a 1973 burglary). (CT 45-46.) Respondent was arraigned on July 16, 1979, and apparently denied all charges, allegations and prior convictions. (CT 87.)

Jury trial began on November 3, 1980. (CT 1457.) On January 5, 1981, the jury convicted respondent of burglary, robbery, kidnapping, and first degree murder, and found all special circumstances true. (CT 1204-1210.) Thereafter, the penalty phase was held with the jury fixing the punishment at death. (CT 1335.)

Upon automatic appeal to the California Supreme Court, the judgment of

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guilt was affirmed, but the special circumstances and death penalty judgments were reversed. (People v. Hamilton, supra, 41 Cal.3d 408, Appendix A.)

STATEMENT OF FACTS

On the evening of May 30, 1979, 24-year-old Eleanor Buchanan (the victim) had dinner with her husband and two infant sons, then left for school in their new van. They had purchased the van about six weeks earlier and the husband, a dental supply salesman, used it in his work during the day, carrying literature and samples. He told his wife there was very little gas in the van and not to add any because he was taking it

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to the dealer the next morning to replace the tank due to a leak.[2/] (RT 2079, 2077, 2099-2101, 2151.)

Mrs. Buchanan had given birth three weeks earlier and was nursing her baby. She cut chunks of diaper, put them over her nipples to keep milk from leaking on her clothes and left for school at 6:30 p.m. She was wearing tan Levi's, a striped beige and brown T-shirt, white knee socks, bra, panties and a simulated leather purse. (RT 2079, 2077, 2099-2101, 2151.)

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2. All locks and windows worked and nothing was broken on the van when Buchanan turned it over to his wife. When respondent was arrested in it on June 8th, the arm rest of the driver's chair, the metal rod on the ceiling that holds the curtain suspended behind the driver and the wind wing on the passenger's side were all broken. (RT 2086, 2106-2107, 2573, 2577.)

Buchanan habitually locked the van which had valuables in it including dental equipment from her husband's work. (RT 2146, 2150-2151, 2156, 2106, 2083.)

On May 30, 1979, she left her math class early after obtaining xeroxed class notes from fellow students because an optional quiz was offered and she had been absent for the birth of her three-week-old son. Students saw her walking towards the parking lot about 9:30 p.m. (RT 2160, 2162, 2171-2173, 2181-2183.)

At about 1:52 a.m. on May 31, 1979, respondent called Donna Hatch in Terrell, Texas to say he had gotten a van and was leaving for Texas when he could get gas. (RT 2363-2364, 2444-2445.)

There was a gasoline shortage during this time and fuel was sold for limited hours. Between 4:30 a.m. and 10:15 a.m. on May 31, 1979, respondent

purchased gas for the Buchanans' van on their Visa card at Roy's Service Station off Highway 8 in El Cajon, California. He signed the invoice, "Terry Buchanan". (RT 2206-2207, 2210-2211.)

About noon on the same day, Eleanor Buchanan's headless, handless body was found in the grass near a cul-de-sac off Pine Valley Road near San Diego. The cul-de-sac was 200 yards off Interstate 8. The body was in full rigor mortis with the elbow in an upright position, completely off the ground, when a deputy sheriff arrived at the scene between 1:30 and 2:00 p.m. Two strings of twine were attached around Buchanan's ankles and there were dark blue pieces of lint sticking to her blood. The body was clothed in a bra, underpants and socks. The head and hands were never found. (RT 2278-2279, 2289-2290.)

During the autopsy, it was determined that a horizontal stab wound in the abdomen was inflicted before death. Three superficial wounds measuring up to five inches on the abdomen were inflicted after death. The pathologist could not determine cause of death because of the absence of the head, but ruled out natural causes. He could not say whether the hands were cut off while Eleanor Buchanan was alive, but suspected she was dead because there was not much hemorrhaging. He could not say whether she was alive when the head was cut and sawed off. (RT 2337, 2333.) Judging from the rigor mortis, death occurred about 16 hours before the autopsy, about midnight on May 30, 1979. (RT 2340-2341.)

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Meanwhile, respondent continued to drive down Interstate 8 from San Diego to Texas. (RT 2216, 2223, 2258-2259, 2264-2265.) He arrived at Donna Hatch's home in Terrell, Texas, on the evening of June 1, 1979. He was alone. The van was dirty, had a broken arm on the driver's chair, a broken mirror and a broken wind wing. (RT 2364-2368.)

Respondent was on bail pending trial on a robbery charge. (See RT 3563.) He took Donna with him to get addresses for his defense in that case. She saw the Buchanan's credit cards in the van and respondent used them for food and gas. (RT 2369-2373, 2376.)

On June 3, 1979, Donna was in the van with respondent and her daughter and saw a highway patrolman. When Donna suddenly turned, while talking to her little girl, respondent told her not to

make sudden moves because they could get shot. She asked why, but he gave no direct answer. Respondent stopped at a pay phone to call his brother and his friend, Clifton. (RT 2376-2379.)

Donna heard respondent tell his brother he had flown to Texas. (RT 2380.)

Cliff Harris and respondent knew each other all their lives and were good friends. (RT 2489.) Respondent told Harris he drove to Texas in a blue El Dorado. Harris was watching TV as they spoke and saw a report that the headless body had been found. He told respondent. (RT 2490-2492; 3594, 3596.)

Respondent had changed when he returned to the van after talking to Clifton Harris. (RT 2380.) Donna asked what was wrong. Respondent said he thought he killed a man. When they

returned to her home, respondent said he would let the van sit a while to see if anyone paid attention to it and that he needed Texas license plates. He asked her to go to a car lot with him to get the plates, but she refused. (RT 2380-2381.)

The next day, Donna broke up with respondent. Respondent said if she had changed her mind because he had lied about his wife being dead, he would kill the ex-wife. (RT 2382.)

Respondent called Donna on Wednesday, June 6, 1979, to discuss bringing her back to California to testify in his robbery case. (RT 2470-2471.) At one point, a friend of Donna's also got on the phone. Respondent said, "I'm going to kill you and your friend, too. And you won't know when I'll be around because I don't have

to be driving this van, I can be in another vehicle." (RT 2474.) Donna never saw respondent after that phone call. (RT 2471-2472, 2382-2384, 2475.)

Respondent continued to use the Buchanans' credit card. It was stipulated he charged a saw, screwdriver and set of wrenches at Babcock Auto Supply in Terrell, Texas, on June 6, 1979, (2518-2519), and a butcher knife and two hanks of twine at Moses five and ten cent store on June 7, 1979. (RT 2519-2520.)

At about 8:30 a.m. on June 8, 1979, respondent entered Stuckey's restaurant in Marietta, Oklahoma. He charged food on Buchanan's Visa, picked up part of his food order and ran out as the manager was calling for authorization on the purchase. The manager called law

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enforcement authorities describing respondent and the van. (RT 2746-2747, 2755-2757.)

That afternoon, respondent was stopped by Oklahoma officers and they ran a VIN number check. They learned the van belonged to a homocide victim. The officers arrested respondent on the local charges. (RT 2598-2599.)

On the way to jail, respondent passed a poster offering a $500.00 reward for David L. Wall, alias "Spider". (RT 2578, 2581.)

On June 9, 1979, San Diego police officers questioned respondent in Oklahoma after reading him his Miranda rights. Respondent said he got the van from Fran, a white woman who had left her

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husband for "Spider", and that he knew "Spider" for six years.[3] Fran and Spider were in Shreveport. They gave him the van and her charge cards to use for food and gasoline. (RT 2846-2848, 2854, 2862.)

Respondent said he saw no blood in the van and the blood on his shoe was his own. (RT 2945-2946, 2904.) A criminalist testifying at trial said the blood on respondent's shoe was type O like Eleanor Buchanan's. (RT 2127.) Respondent was type A. (RT 3112, 3110, 3114.) He later testified the blood

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3. Neither respondent's parents (RT 2048, 2078), nor friends (RT 2489-2734) ever heard of "Spider". "Fran" was Eleanor Buchanan's nickname. It was written on the school papers she was carrying on the night she disappeared and also in an unmailed birth announcement she had in her purse. (RT 2116-2117.)

could not have come from the van's carpeting, but went on wet. It had no blue fibers in it. (RT 2127, 4017-4018.)

The police showed respondent a photograph of Eleanor Buchanan during questioning and asked if that were Fran. He said it looked like her but Fran was a little skinnier. Asked what Fran was wearing when she and Spider picked him up to leave San Diego, respondent said the only time he saw her, she wore light jeans and a beige non-leather purse. (RT 2873-2875.)

En route to San Diego respondent was disturbed about the arrest for murder and kept saying it was not going to stick because all the police had was a body they could not identify and a runaway wife. (RT 2950.) Shortly after respondent's return to San Diego, Terry

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Buchanan received a letter with respondent's return address in county jail. It said, "You are probably full of grief when you should be highly pissed-off . . ." because Fran was not dead but had left with Spider and was smoking Sherman sticks. Buchanan turned the letter over to the District Attorney's Office. (RT 2140-2145.)

Respondent hinted to a local girlfriend in letters and during a jail visit that she should call Terry Buchanan and the press, posing as Eleanor Buchanan and telling them she was alive. (RT 3618-3621.)

On January 24, 1980, respondent was talking about his case to another prisoner. The prisoner said, "Who are you trying to convince, Hamilton, me or yourself?" Hamilton replied, "Well, I

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did it, but they'll never prove it." (RT 3023, 3030.) The prisoner reported the conversation to a guard. (RT 3032.)

While transporting respondent between the jail and courtroom for trial, a deputy sheriff was tightening respondent's security chains. Respondent said, "You go ahead and have your fun, I'll have mine later." The guard responded, "I thought you already had your fun?" Respondent replied, "Yeah, and I'll kill you and a lot more, too, and you may be first on my list." (RT 3327-3329.)

DEFENSE

Respondent testified that he saw the Buchanan's van parked on the street with Eleanor's purse on the passenger seat just after midnight on May 31, 1979, and took it. (RT 3608, 3439.) He never saw the victim dead or alive. (RT 3438.)

HOW THE FEDERAL QUESTION IS PRESENTED

Three years after respondent's trial, Carlos v. Superior Court (1983) 35 Cal.3d 131 misinterpreted Enmund v. Florida (1982) 458 U.S. 782 and held intent to kill was an element and prerequisite to a finding of a felony-murder special circumstance under California's 1978 death penalty initiative.

The California Penal Code enumerates special circumstances for certain serious felonies that so aggravate murders occurring during those felonies that the appropriate punishment is death or life imprisonment without possibility of parole.

Relying on Connecticut v. Johnson (1983) 460 U.S. 73, the California Supreme Court then ruled the failure to instruct a jury on intent to kill with regard to a felony-murder special circumstance (Carlos error)

required reversal in all but a few limited circumstances because it eliminated an "element" of the crime from jury consideration. (People v. Garcia (1984) 36 Cal.3d 53 certiorari denied (1985) 105 S.Ct. 1229; People v. Hamilton (1985) 41 Cal.3d 408, 433, concurring opinion.)

At the guilt phase of this trial, the jury was instructed on felony murder without an instruction on intent to kill. The jury found the felony-murder special circumstances to be true. In light of People v. Garcia, supra, the special circumstances and death penalty were reversed by the California Supreme Court for Carlos error using a standard of prejudice based on Connecticut v. Johnson. (People v. Hamilton, supra, 41 Cal.3d at pp. 431-432.)

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The People urged rehearing on the basis that (1) intent to kill is manifest from the facts combined with defendant's failure to introduce any evidence of accidental killing, (2) the Garcia test is too demanding, and (3) reversal should be limited to cases that presented some evidence of lack of intent or affirmed with opportunity to present such evidence. The petition for rehearing was denied with two justices dissenting.

Thereafter, this Court decided Cabana v. Bullock (1986) 474 U.S. ___ [88 L.Ed.2d 704] which suggested an erroneous finding on a special circumstance was not the type of error covered by Connecticut v. Johnson, supra, 460 U.S. 73.

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REASON FOR GRANTING THE WRIT

Certiorari should be granted as the California Supreme Court's decision conflicts in principle with Cabana v. Bullock, supra, and is based on a misinterpretation of Connecticut v. Johnson, supra, 460 U.S. 73 and other decisions of this Court.

The California Supreme Court held intent to kill is an element of special circumstances that must be found by the jury under federal law (Carlos v. Superior Court, supra, 35 Cal.3d 131.) and failure to instruct the jury on intent to kill removed an "element" from its consideration so as to require reversal under Connecticut v. Johnson. (People v. Garcia, supra, 36 Cal.3d at p. 539; People v. Hamilton, supra, 41 Cal.3d at pp. 431-432.)

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However, Cabana expressly declared Enmund "establishes no new elements of the crime of murder that must be found by the jury" (Cabana v. Bullock, supra, 88 L.Ed 2d at p. 715) and indicates the decision of whether to impose the death penalty (i.e., a finding of a special circumstance) is not a finding of guilt or innocence of the kind discussed in Connecticut v. Johnson, supra. (Id., at p. 716.) This holding implies that special circumstance findings are not covered by Connecticut v. Johnson and the decisions in Garcia and Hamilton thus do not comport with federal law.

Therefore, certiorari should be granted because the opinion of the California Supreme Court on this issue misreads the application of Connecticut v. Johnson to special circumstance findings.

ARGUMENT

PURSUANT TO CABANA V. BULLOCK, CONNECTICUT V. JOHNSON DOES NOT CONTROL THE STANDARD OF PREJUDICE FOR A TRIAL COURT'S FAILURE TO INSTRUCT ON THE INTENT-TO-KILL ELEMENT OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE

Petitioner, the State of California, request certiorari be granted by this Court to consider the important question of whether the standard of prejudice espoused in Connecticut v. Johnson (1983) 460 U.S. 73 can be applied to a situation where the jury is not instructed on the issue of intent to kill with regard to a felony-murder special circumstance.

The California Supreme Court declared intent to kill an "element" of special-circumstance felony murders. (Carlos v. Superior Court (1983) 35 Cal.3d 131.) When it considered the standard of prejudice applicable to the

trial court's failure to instruct on intent to kill, the California Supreme Court declared an element of special circumstance felony-murder had been eliminated from jury consideration bringing the error under the rule espoused in Connecticut v. Johnson, supra. (People v. Garcia (1984) 36 Cal.3d 53, certiorari denied (1985) 105 S.Ct 1229.) Under Connecticut v. Johnson, a jury instruction which takes an issue involving an element of the crime completely away from the jury can never be treated as harmless error. (Connecticut v. Johnson, supra, 74 L.Ed.2d at p. 835.) Therefore, Garcia declared Carlos error reversible in all but a few situations.

The California Supreme Court in this case concluded the failure to instruct on intent to kill was prejudicial in accord with Garcia

and Connecticut v. Johnson, and reversed the special circumstances. (People v. Hamilton, supra, 41 Cal.3d at pp. 431-432.) However, Cabana v. Bullock, supra, 88 L.Ed 2d 704 indicates the California Supreme Court's reliance on Connecticut v. Johnson in Garcia and this case was misplaced.

Cabana holds that the Constitution is not violated by the execution of a person who in fact killed, attempted to kill, or intended to kill, regardless of who makes the determination of the requisite culpability. (Id., at p. 716.) The determination may be made by the trial judge, an appellate court,

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or a federal court on habeas corpus, as well as the jury. (Id., at p. 750.)[4/]

Cabana v. Bullock, supra, 88 L.Ed 2d 704 also expressly stated Enmund "establishes no new elements of the crime of murder that must be found by the jury" (Id., at p. 715) and held what punishment is appropriate in any given case is not a decision that must be made by a jury even if the death penalty is chosen. (Id., at p. 716.)

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4. In the case at bar, the trial judge found " . . . when the victim returned to the vehicle from an evening class she was attending at Mesa College on May 31, 1979 [.] the defendant violently overpowered the victim, hogtied her, inflicted a stab would to her stomach while she was still alive; murdered her, and then to avoid identification of the victim and ultimately identification of the defendant through the victim's vehicle, he further desecrated her body by severing her head and her hands." (RT 4737.)

Of greater import, however, Cabana clearly indicates a finding on a special circumstance involves a determination of whether death is the appropriate punishment and that such a finding is not a finding of guilt or innocence of the type discussed in Connecticut v. Johnson, supra. (Cabana v. Bullock, supra, 88 L.Ed.2d at p. 715.)

Footnote 4 of Cabana does not compel a contrary result. It discusses Hicks v. Oklahoma (1980) 447 U.S. 343 which held that where state law creates for the defendant a liberty interest in having the jury make particular findings, the due process clause implies that appellate findings do not suffice to protect that entitlement. (Cabana v. Bullock, supra, at p. 717, fn. 4.)

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Carlos v. Superior Court, supra, discussed a state statute, but was based primarily on a misreading of Enmund v. Florida, supra. Carlos concluded Enmund required an intent to kill for the actual killer as well as the aider and abettor. However, as Cabana makes clear, the actual killer need not have the intent to kill. (See Cabana v. Bullock, supra, 88 L.Ed.2d at p. 715.)

Since Carlos was based on a misreading of federal constitutional law, it was not based on any state liberty interest. Thus, footnote 4 did not preclude application of any language in Cabana to this case.

Cabana makes it clear that the standard of prejudice espoused in Connecticut v. Johnson has no applicability at all to any defect relating to the special circumstance finding. Thus, to

the extent Garcia applies Connecticut v. Johnson, supra, in such a situation, it misreads federal constitutional law as set forth by this Court in Cabana v. Bullock, supra.

Certiorari should be granted. Indeed, the federal question can scarcely be avoided since the concurring opinion below admits Garcia is based squarely on federal constitutional law as set forth in Connecticut v. Johnson, supra. (People v. Hamilton, supra, 41 Cal.3d at pp. 433-436; Grodin, concurring.)

Considered in context, Cabana's holding and its discussion of a reviewing court's authority to correct instructional error arising from the sentencing phase of trial leads to the conclusion that Connecticut v. Johnson does not provide the appropriate test of prejudice when a jury has not been properly instructed on

the intent element of a felony-murder special circumstance. (See People v. Payne (1986) 177 Cal.App.3d 1189, 1194-1195.)

Since Cabana now indicates Connecticut v. Johnson would not apply to a situation such as that presented here, Garcia and the decision of the California Supreme Court in this case are no longer viable.

The next question, of course, is what standard does apply. Not all federal constitutional errors are prejudicial. In the context of a particular case, some errors have little or no likelihood of affecting the jury's finding. Thus, Chapman v. California (1967) 386 U.S. 18 establishes two classes of constitutfonal errors. Those errors that are so basic to a fair trial that their infraction can never be treated as

harmless and those, less fundamental errors, that may be considered harmless if the beneficiary of the error proves beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (Chapman v. California, supra, 386 U.S. at p. 24.)

This Court recently reaffirmed these harmless error principles in Delaware v. Van Arsdell (1986) ___ U.S. ____ 46 CCH S.Ct. Bull. p. 1681. Stating certain constitutional errors such as denying assistance of counsel at trial or compelling a defendant to stand trial before a trier of fact with a financial stake in the outcome are so fundamental and pervasive as to require automatic reversal (Id., at p. 1681), others (erroneous limitation to cross-examination admission of identification obtained in violation of

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right of counsel or nontestifying co-defendants' statement) are subject to the harmless error standard of Chapman. (Delaware v. Van Arsdell, supra, 46 CCH S.Ct. Bull. at pp. 1689, 1692.)

In the present case, we are not dealing with the elements of an offense. After guilt was established, special circumstances were found which are a sentencing consideration to determine whether the defendant's crime comes within a category which makes him liable for the punishment of death or life imprisonment without possibility of parole. The determination of special circumstances would seem less fundamental than the classic determination of whether a criminal offense has occurred. Thus, it is reasonable to treat any error in instructions concerning the elements of a special circumstance under the harmless

error test of Chapman as suggested by Cabana v. Bullock, supra.

In any event, since Cabana v. Bullock has now made it unmistakably clear that the finding of a lack of intent to kill is not a guilt or innocence determination and that the California Supreme Court has thus erroneously applied the Connecticut v. Johnson prejudice test to a defect in such a determination in People v. Garcia, supra, and in this case, it is respectfully requested certiorari be granted.5/

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5. Indeed, the concurring opinion below suggests that Garcia may have been wrongly decided, speculating this Court may grant certiorari "in this or another case and tell us we were wrong in Garcia. . . ." (People v. Hamilton, supra, 41 Cal.3d at p. 436.

CONCLUSION

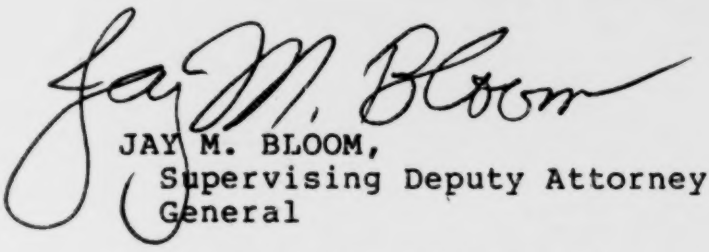
For the foregoing reasons, the People respectfully submit the writ of certiorari should be issued to review this decision of the California Supreme Court.

Respectfully submitted,

JOHN K. VAN DE KAMP,
Attorney General of the
State of California

STEVE WHITE,
Chief Assistant Attorney
General

PAT ZAHAROPOULOS,
Deputy Attorney General



JAY M. BLOOM,
Supervising Deputy Attorney
General

Attorneys for Petitioner

PZ:ks:ab
4/18/86

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

No: _____
October Term, 1985

JOHN K. VAN DE KAMP
Attorney General of
the State of California
PAT ZAHAROPOULOS
Deputy Attorney General
JAY M. BLOOM
Supervising Deputy Attorney
General

110 West A Street, Suite 700
San Diego, California 92101

PEOPLE OF THE STATE OF CALIFORNIA

Petitioner

v.

BERNARD LEE HAMILTON

Respondent

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego in which County the below stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within PETITION FOR WRIT OF CERTIORARI AND APPENDICES as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Barry L. Morris
Attorney at Law
580 Grand Avenue
Oakland, CA 94610

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Thomas McArdle
Deputy District Attorney
County of San Diego
P.O. Box X-1011
San Diego, CA 92112

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 6 day of May, 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, May 6, 1986

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 6th day of May, 1986.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1986

85-1853

No. _____

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v.

BERNARD LEE HAMILTON,

Defendant and Appellant.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA SUPREME COURT

JOHN K. VAN DE KAMP,
Attorney General of the
State of California
STEVE WHITE,
Chief Assistant Attorney
General
HARLEY D. MAYFIELD,
Assistant Attorney General
JAY M. BLOOM.
Supervising Deputy Attorney
General
PAT ZAHAROPOULOS,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7857

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APPENDIX A

[Filed January 23, 1986]

C O P Y

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	Crim. 21958
	)	Super. Ct.
v.	)	No. 47283
	)	
	)	
BERNARD LEE HAMILTON,	)	
	)	
Defendant and Appellant.	)	
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MODIFICATION OF OPINION

BY THE COURT;

The opinion herein, filed on December 31, 1985, is modified as follows:

On page 28, lines 2 and 3, of the typed opinion, delete "People v. Bell (1983) 149 Cal.App.3d 739, 742-743."

[Filed December 31, 1985]

C O P Y

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE,	)	
	)	
Plaintiff and Respondent,	)	Crim. 21958
	)	Super. Ct.
v.	)	No. 47283
	)	
	)	
BERNARD LEE HAMILTON,	)	
	)	
Defendant and Appellant.	)	
	)	

Defendant Bernard Lee Hamilton was convicted of first degree murder, burglary, robbery and kidnaping (Pen. Code, §§ 187, 459, 211, 207).1/ Special circumstance allegations that the murder was committed while defendant was engaged in or was an accomplice in the commission

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1. Except as otherwise indicated, all statutory references are to the Penal Code.

SEE CONCURRING AND DISSENTING OPINIONS

of robbery (§ 190.2, subd. (a)(17)(i)), burglary (§ 190.2, subd. (a)(17)(vii)), and kidnaping (§ 190.2, subd. (a)(17)(ii)) -- all under the 1978 death penalty law -- were found to be true. The jury fixed the punishment at death. The appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

For reasons hereafter stated, we affirm the judgment of guilt, but set aside the special circumstance findings and reverse the penalty judgment.

I. FACTS

1. Prosecution Case

On May 31, 1979, about 1 p.m., the body of Eleanore Frances Buchanan was discovered in the grass near a cul-de-sac off Pine Valley Road, near San Diego. Harry Piper noticed it while walking back

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to his car from target shooting. The body had no head or hands and was clothed only in a bra, underpants and socks.

The body appeared to be in full rigor mortis when a deputy sheriff arrived at the scene between 1:30 and 2 p.m. Two strings of white cord were tied around the ankles, and there were dark blue fibers sticking to some blood on the body. There were marks on the wrists indicating that they had been tied together. A search of the area revealed no clothing or anything else that could be associated with the victim.

Dr. Luibel, who performed the autopsy, was unable to determine the cause of death because of the absence of the head. (The head and hands have never been found.) He could, however, rule out natural causes. There were three long superficial incisions on the abdomen

that appeared to have been inflicted after death. There was a horizontal stab wound on the abdomen that had probably been inflicted before death, but it did not penetrate the stomach or intestines. The right hand appeared to have been sawed off and the left one cut off with a knife. The head was probably removed by using both a knife and saw. Dr. Luibel could not say whether the victim was alive or dead when her head was cut off. The small amount of hemorrhage at the wrists suggested that the victim was probably dead when her hands were cut off. The body was still in full rigor mortis at 4 p.m. on May 31, 1979, when Dr. Luibel examined it. Death would have occurred about 16 hours before then -- about midnight the night before.

Terry Buchanan, the victim's husband, testified that his wife had

given birth to a baby boy three weeks before her death and that she was still nursing him on May 30, 1979. That day Mrs. Buchanan left the house about 6:30 p.m. to go to a math class at Mesa College from 7 to 10 p.m. She was wearing tan levis, a beige and brown T-shirt, and was carrying a brown simulated leather purse. Mrs. Buchanan drove the family's only vehicle -- a new blue van. There was very little gas in the tank because Buchanan planned to have the tank replaced the next day. Since Buchanan used the van during the day for his dental supply sales work, the van contained dental equipment and supplies. Buchanan said his wife was very security conscious and customarily locked the van. He also said that everything in the van was in good condition when she left.

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Mrs. Buchanan was last seen alive walking toward the parking lot from her math class about 9:30 p.m. Fellow students had given her copies of class notes for the classes she had missed because of the birth of her baby. Mrs. Buchanan had left class a little early because an optional quiz was given at 9:30 p.m.

At 1:52 a.m. (California time) on May 31, 1979, defendant called his girlfriend, Donna Hatch, in Terrell, Texas from his parents' home in San Diego. He told Donna that he had a van and was planning to leave for Texas as soon as the gas stations opened in the morning.

There was a gasoline shortage at the time, and gas stations were only open for limited hours. Between 4:45 a.m. and 10:15 a.m. on May 31, 1979,

defendant used Terry and Eleanore Buchanan's Visa card to buy gas in El Cajon, California. The card was used two more times that day to buy gas for the van -- once in El Centro, California at a station that was open between 6 a.m. and 10 a.m., and once in Tucson, Arizona.

When defendant arrived at Donna Hatch's home in Terrell, Texas on the evening of June 1, 1979, the van was dirty, had a broken arm on the driver's chair, a broken mirror, and a broken wing window on the passenger side. Defendant took Donna with him on errands in the van on June 1, 2 and 3, 1979. Donna saw some credit cards in the name of Terry and Eleanore Buchanan in the compartment between the seats. Defendant used the credit cards to buy gas and food while Donna was with him.

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On June 3, while Donna was in the van with defendant and her daughter, they saw a highway patrolman. When Donna turned back to talk to her daughter, defendant told her not to make any sudden moves because they could get shot. Later, defendant stopped at a pay phone to call his brother and his friend Clifford. Donna heard defendant tell his brother he had flown to Texas. Clifford testified that when defendant called him, he was watching a report on TV that the body of a white woman with her head and hands cut off had been found; he told defendant about it. Defendant seemed nervous when he returned from talking to Clifford. He told Donna that he thought he had killed a man, but he did not want to tell her any details because she might not want to have anything to do with him if he told her.

Defendant said he would let the van sit a while to see if anybody paid attention to it. He also said he needed some Texas license plates. He asked Donna to go with him to a car lot, but she refused.

Donna broke up with defendant the next day. Defendant said that if Donna were upset about the fact that he had lied about his ex-wife being dead, he would kill his ex-wife. On June 6, defendant called Donna to discuss bringing her back to California to testify for him in a pending case. At one point, a friend of Donna's got on the phone. Defendant told Donna, "I'm going to kill you and your friend, too. And you won't know when I'll be around

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because I don't have to be driving this van, I can be in another vehicle." Donna never saw or talked to defendant after that phone call.

Defendant continued using the Buchanans' credit cards to buy gas, food and other items. It was stipulated that on June 6, defendant charged a saw, screwdriver and set of wrenches at a local store, and on June 7, he bought a butcher knife and two shanks of twine at a variety store.

While driving the van in Oklahoma on June 8, 1979, defendant was stopped by a deputy sheriff. The deputy ran a check of the van's VIN number and learned that it belonged to the homicide victim. Defendant was arrested and taken to jail. On the way to the jail he passed a poster offering a reward for David L. Wall, alias "Spider."

On June 9, 1979, San Diego sheriff's deputies interviewed defendant in Oklahoma. They began by introducing themselves, saying that they had come to talk to defendant about the van. Defendant interrupted them, stating: "Yeah, the guy told me yesterday, one that pulled the gun on me, that it had been involved in a homicide, and uh . . . ." Defendant was then advised of his Miranda rights, which he waived. Defendant told the deputies he had left San Diego in the van with Spider and Fran, a white woman who had left her husband for Spider. Spider's real name was Calvin Spencer. Fran and Spider were presently in Shreveport, Louisiana. They had given defendant the van and credit cards when he said he did not want to stay in Louisiana. Defendant was shown a picture

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of Eleanore Buchanan with her baby. He said it looked like Fran, but Fran was a little skinnier.[2/] Defendant said "the only time I seen her" Fran was wearing light colored jeans and carrying a beige nonleather purse.

Enroute to San Diego, defendant was disturbed about his arrest for murder and kept saying it was not going to stick because all the police had was a body

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2. Fran was Eleanore Buchanan's nickname. It was on the school papers she had been carrying and on an unmailed birth announcement that had been in her purse.

they could not identify and a runaway wife.[3]

Shortly after defendant's preliminary hearing, Terry Buchanan received a letter with defendant's county jail return address. It said, "You are probably full of grief when you should be highly pissed-off . . ." because Fran was not dead but had left with Spider and was smoking Sherman Sticks. Buchanan turned the letter over to the district attorney's office.

Steven Thomas, an inmate at the San Diego County jail, testified that on January 24, 1980, he had a conversation with defendant about his case. He asked

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3. The body was, in fact, quickly identified by a number of distinctive features, which included moles, toenail polish, scars, recent episiotomy, and the nursing bra.

defendant, "Who are you trying to convince, Hamilton, me or yourself?" Defendant replied, "Well, I did it but they'll never prove it." Thomas reported the conversation to the guard. Thomas had been convicted of murder, robbery, forgery, burglary and escape. Thomas testified he was in the federal witness protection program against organized crime, but had not received any money from the United States with respect to that program.

While transporting defendant between the jail and courtroom on August 21, 1979, Deputy Sheriff Parsons was tightening defendant's security chains. Defendant said, "All right, you have your fun, I'll have mine later." Parsons responded, "I thought you already

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had your fun." Defendant replied, "Yeah, and I'll kill a lot mroe, too, and you may be first on my list."

Brandon Armstrong, a criminalist, testified that the blue fibers that had been on the victim's body could easily have come from the carpet in the victim's van. Blood on the carpet in the van matched the type and characteristics of the victim. Several hairs found in the carpet stains could have been hers. Armstrong also examined blood found on defendant's shoe and concluded that it had been smeared on when wet. The blood on defendant's shoe was type O -- the victim's type.[4/] Defendant's type was A.

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4. Armstrong testified on rebuttal that the blood on defendant's shoe could not have come from rubbing against the blood on the van's carpet.

A questioned documents expert testified that defendant was the person who had signed Terry Buchanan's name to the credit card invoices.

2. Defense Case

Defendant's mother testified that he was at her house between 8 and 9 p.m. on May 30, 1979. She said that although she testified at the preliminary hearing that she did not remember seeing defendant on the evening of May 30, 1979, she later spoke to defendant who refreshed her recollection by reminding her of some things that had happened that evening.[5]

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5. Defendant had written two letters to Donna Hatch after her preliminary hearing testimony attempting to refresh her recollection as to events that involved her.

Mary Brewer, a relative of defendant's who lived in Oklahoma City testified that defendant had visited her in the early part of June 1979. he gave her a ride in the van, and she did not remember seeing any blood in it.

Defendant testified that he had never seen the victim alive or dead. He said he went to his sister-in-law's house after he left his parent's house about 9 p.m. on May 30, 1979. He saw the Buchanans' van parked on a street between 12:45 and 1 a.m. on May 31, 1979, while walking home from a 7-Eleven store after talking to Butch McIntyre.[6]

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6. McIntyre testified he saw defendant after watching the NBA game on TV. There had, however, been no game on May 30. There had been one on May 29, 1979.

The keys were in the ignition, the wing window was broken, and a purse was on the passenger seat. Defendant drove the van home, called Donna Hatch, put his clothes in it and left for Texas shortly before sunrise. Defendant said he broke the armrest on the driver's seat when he was moving from the passenger seat to the driver's seat. (The seats were swivel chairs with armrests.)

Defendant explained that he had told the officers in Oklahoma that he had driven across the country with Spider and Fran because he did not want to get stuck with an auto theft charge.

Defendant denied having threatened to kill Donna Hatch. He said he bought the saw and other items on June 6 before he spoke to Donna Hatch. He planned to use them to burglarize a store in Terrell. Defendant said he was

attempting to distract Donna when he told her he thought he had killed someone; she was angry at him because she had just found out he had lied about his ex-wife being dead.

David Faulkner, an entomologist, testified about an experiment he had conducted in an attempt to determine when the victim's body had been left at the cul-de-sac. Faulkner took a rabbit, with its head and forepaws severed, and at midnight put it where the victim had been found. The purpose was to determine the amount of insect activity that would occur. Faulkner testified that within a few hours of sunrise there were a lot of flies around the rabbit. Based on this experiment and his knowledge of the temperature on the morning of May 31, 1979, Faulkner concluded that the earliest the body would have been put there would have

been about 9 a.m. Faulkner admitted, however, that there is a great deal of variation in the degree to which insects are attracted to different human bodies.

Parker Bell, a criminalist testified that the blood on defendant's shoe was a smear, as opposed to a droplet or splatter. He thought the blood could have come from the carpet, but he acknowledged that there were no blue fibers in the blood. (The blue carpet shed badly.) On cross-examination, however, Bell admitted it was possible that the blood could have smeared on defendant's shoe by having bumped one of the victim's bloody stumps.

Dr. Ali Hameli, Chief Medical Examiner of the State of Delaware, testified that in his opinion the victim died between 9:30 and 12 p.m. on May 30. Dr. Hameli also thought that rigor mortis was

present when the body was placed at the cul-de-sac and that the body could have been put there no earlier than 4 a.m. on May 31.

Allen Biggs testified that he had been at the cul-de-sac about 10 a.m. on May 31, 1979. He had seen Mr. Piper's car but no body. Deputy Sheriff Crawford testified that tire tracks at the scene in the cul-de-sac did not match the tire tracks of the victim's van.7/

II. GUILT PHASE

1. Faretta Motions

Defendant contends that he was improperly denied his constitutional right to represent himself on two occasions.

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7. Crawford had testifed for the prosecution and had identified photos that showed drag marks from the roadway to where the body had been found. The drag marks appeared to start on the pavement.

The first motion was made during a section 1538.5/995 hearing, which began on March 24, 1980, and ended on May 21, 1980. At that time trial was set for June 23, 1980. On April 25, defendant's appointed counsel, Thomas Ryan and Vivian Camberg, requested a continuance of the hearing in order to appear before the presiding judge and ask to be relieved. The court expressed some frustration about the delays caused by defendant's difficulties with counsel and noted that defendant had just appeared before the presiding judge and been denied his request to have counsel relieved. The court nevertheless granted the continuance, and the presiding judge heard and denied counsel's motion. Defendant then renewed his motion to relieve counsel, which was also denied.

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On May 1, defendant filed a motion to relieve counsel and to proceed in pro. per. At the hearing on the motion on May 9, defendant decided to withdraw his pro. per. motion and instead requested that he be given cocounsel status. The request was granted. On May 20, however, at the time scheduled for resumption of the section 1538.5/999 hearing, defendant requested to have his counsel relieved and new counsel appointed. Defendant stated that if that motion were denied, he would then renew his motion to proceed in pro. per. The court listened to defendant's complaints about counsel and counsel's response and denied the motion to relieve counsel. It also denied the motion to proceed in pro. per. "on the 995," noting that the court was in the middle of a hearing that had begun two months earlier and had already

produced several days of testimony. The court cited defendant's inadequate knowledge of the legal principles involved. Before ruling on the motion, the court noted the great difficulty there would be in finding any other lawyer to come in at this stage of the proceedings. The prosecutor objected to any further delays and urged the court to proceed, noting that he had witnesses scheduled to appear.

No error appears in the trial court's denial of defendant's motion to proceed in pro. per. In People v. Windham (1977) 19 Cal.3d 121, we held that unless such a motion is made within a reasonable time before commencement of trial, it does not invoke the constitutionally mandated unconditional right of self-representation, but puts the matter within the court's discretion. The

motion here was untimely within the context of this protracted 1538.5/999 hearing. Accordingly, the court properly exercised its discretion under Windham in denying the motion on the ground that defendant had not stated a valid reason for relieving counsel and was grasping at anything to delay the proceedings. The fact that the court may also have referred to defendant's lack of legal ability -- an irrelevant consideration under Faretta -- does not detract from the validity of its other reasons for denying the motion.

On October 14, 1980, defendant filed another written motion to proceed in pro. per. On October 20, however, he requested that his motion be taken off calendar, stating that he wanted to keep trying to get along with counsel and that

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he did not think that pro. per. status was the answer to his problems.[8/]

Defendant revived his motion on November 3, alleging inadequate representation by counsel. At that time, however, the jury had been selected and counsel were ready to give their opening statements. The court held an ex parte in camera session to hear and discuss defendant's complaints about counsel: Counsel's failure to keep him informed of discovery, counsel's decision to have a de novo section 1538.5 hearing, lack of

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8. The problems he referred to were his continual dissatisfaction with counsel's strategic decisions, asserted difficulty in communicating with counsel, and counsel's alleged failure to keep him informed of all discovery. Defendant stated these complaints on a number of occasions, and the record is replete with discussions between the court, defendant and his counsel about their problems. Defendant was constantly second-guessing counsel on strategic decisions.

communication, and inadequate investigation. Counsel responded with apparanetly satisfactory explanations on all counts.

After more than one and a half hours of discussion about defendant's difficulties with counsel, the court had the prosecutor join the proceedings and indicated that it was going to deny the motion to relieve counsel. The court stated that the reasons for defendant's request seemed groundless. It felt that defendant would be unable to adequately represent himself; he would have difficulty in communicating due to his soft voice, and he did not have sufficient objectivity to cope with examining witnesses and addressing the court. The court noted that defendant was receiving high-quality representation and had a proclivity to substitute counsel. It further noted that it had already taken

four weeks to select the jury. Defendant reminded the court that he was not asking for a continuance.

This motion, too, was properly denied under Windham. Since the jury had already been selected at the time defendant revived his motion, it was not timely for purposes of having an absolute right of self-representation under Faretta v. California (1975) 422 U.S. 806. (See People v. Harris (1977) 73 Cal.App.3d 76 [motion made after jury selection underway]; People v. Hall (1978) 87 Cal.App.3d 125 [motion made right before jury selection]; People v. Hill (1983) 148 Cal.App.3d 744 [motion made at beginning of trial before jury selection].) The fact that defendant did not ask for a continuance is not determinative. (See People v. Hill, supra, 148 Cal.App.3d 744.) Windham lists a

number of factors for the court to consider in exercising its discretion: "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (19 Cal.3d at p. 128.) The court considered those factors and acted within its discretion in denying defendant's request. Again, the court's reference to impermissible factors -- such as defendant's lack of legal knowledge and his soft voice -- does not invalidate the rest of its reasoning.

2. Shackling

On September 18, 1980, before the trial started, defendant appeared with his counsel at an in camera hearing

to discuss whether he should be shackled at trial. Counsel reported to the court that defendant had attacked his assistant 10 days earlier while she was meeting with defendant in a jail holding cell. Then, on the night before the hearing, defendant had punched counsel in the mouth while he was visiting defendant in jail. Counsel stated he had no doubts about defendant's mental competency and that he thought defendant was merely "acting out" as a result of his frustration. Counsel, however, believed that defendant would continue such behavior and feared its effect on the jury if such outbursts occured at trial. He therefore requested that defendant be shackled during trial in order to avoid the possibility of the extreme prejudice that would result from anticipated outbursts. Defendant objected to shackling and

reminded the court that he had never caused a problem in his previous court appearances. Although the court did not rule on the issue of shackling at that time, defendant appeared at later pretrial hearings in shackles, apparently as a result of a security decision made by the sheriff's department.

On September 24, still before trial, defendant and counsel appeared at another in camera hearing. At this hearing, which was basically held to consider defendant's motion to proceed in pro. per., defendant requested removal of the shackles (particularly those on his arms) to enable him to handle his papers and to take notes. Counsel, however, requested that the shackles remain on during the argument. He reiterated his position that he felt it was in defendant's best interests to be shackled from

the beginning of trial rather than take the chance of the extreme prejudice resulting from an outburst at trial and the midtrial appearance of shackles. Defendant again objected, citing the discomfort and inconvenience of shackles and the fact that he had never caused a problem in his many other court appearances in this case.

On October 2, before jury selection was to begin, another in camera hearing was held at defense counsel's request. Counsel stated that he had reconsidered the matter after discussions with defendant and with other attorneys. He now felt that defendant should be allowed to start trial without shackles. Counsel said he believed that defendant intended to behave at trial and noted that defendant had not disrupted any proceedings

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in the past. After hearing from defendant and checking with jail authorities, the court concluded that defendant should be unshackled but that he would still have to wear a knee brace which would not be visible to the jury. Jury selection began later that day.

At the next court session on October 6, defendant complained about the discomfort of the knee brace. The court took the matter under submission and concluded later that day that defendant should start trial without any restraints.

On October 8, however, while jury selection was still in progress, the court held another in camera hearing on the question of shackling. A sheriff's deputy was sworn as a witness and related an incident that had happened at the jail that morning: Defendant was reminded at

6, 7:20, and 7:40 a.m. that he was to go to court and should get ready. Defendant was still in bed when the deputies arrived to take him to court. When they removed his blanket, defendant jumped up and took a fighting stance. He was subdued, but he continued to struggle and be uncooperative as he was being moved from jail. Untimately the deputies had to drag him part way. Defendant called the deputies cowards and asked them to remove the chains and fight him "one on one." Another deputy testified that while at the holding cell, defendant again became abusive and proceeded to remove all of his clothes. He came to court wrapped in a blanket. Defense counsel cross-examined the deputies, and defendant gave his version of the incident.

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After argument by defense counsel against shackling and by the prosecutor for shackling, the court concluded that defendant should be shackled. It cited the pattern of increased agitation by defendant despite its efforts to accommodate defendant's problems with jail routine: Mr. Hamilton has obtained the privileges over and above those privileges granted to other prisoners in the jail. He has a private cell, private telephone, he is able to work on his case, being co-counsel in the case. He has chosen to defy orders that have been made by officers in the jail. He has refused to dress to come to court. He is coming into court with jail garb and apparently a blanket thrown over his body and one shoe on and one shoe off, apparently. He has defied all authority and I think it is just a matter of time

before he would begin to defy all authority here in the courtroom. I am going to take the steps that are necessary to make certain that doesn't happen. I am going to require that he be in chains, his ankles and hands, for the trial. I regret the necessity to do it. I regret that Mr. Hamilton brought this upon himself. But I find no alternative. I am not going to subject anybody in this courtroom to any possible injury or violent confrontation. This case is going to be tried in an orderly and a quiet and judicial manner."

Defendant contends the court abused its discretion in ordering him to be shackled during trial because there was no showing of manifest need. In People v. Duran (1976) 16 Cal.3d 282, we held that the court had abused its discretion in ordering a defendant

shackled without a showing on the record of a manifest need for such restraints: "There is no showing that defendant threatened to escape or behaved violently before coming to court or while in court." (Id. at p. 293.) We noted that a trial court must make the decision to use physical restraints on a case-by-case basis and that such a determination, when made in accordance with the procedures specified (hearing outside jury's presence with court making due process determination regarding necessity for restraints of record), "cannot be successfully challenged on review except on a showing of a manifest abuse of discretion." (Id. at p. 293, fn. 12.)

No abuse of discretion is shown here. The trial court followed the dictates of Duran: it held a hearing, heard

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testimony by the deputies and by defendant, and made an on-the-record determination of the necessity for ordering defendant shackled. The fact that defendant had made numerous earlier appearances without disruption does not dispel the present threat that the court found based on defendant's current actions. Defendant's reliance on People v. Jackla (1978) 77 Cal.App.3d 879, is misplaced for the decision there was not based on the judge's independent determination of the need to shackle or on the defendant's conduct while in custody.

Defendant's complaints about the court's earlier decision to shackle him based on his counsel's request are no longer pertinent since counsel changed his mind before trial and the court acceded to counsel's plea for removal of the shackles. Although fault might be

found with counsel's reasoning in requesting shackling in the first instance -- that is, to saddle defendant with the certainty of prejudice from appearing before the jury in shackles inorder to avoid the possiblity of prejudice from an outburst at trial -- the matter became moot before trial ever commenced. Defendant's complaints about the procedure employed in those earlier hearings on shackling are also moot.

3. Evidentiary Issues

a. Exhibits 91, 92, 93

Defendant contends the trial court prejudicially erred in admitting three letters he wrote in 1973 while in prison (exhibits 91, 92, 93). Two of the letters were written to a superior court judge asking him to reconsider the prison sentence he had imposed, and offering, in return for such condition, to provide

information about crimes committed by others. The third letter was to the district attorney's office pleading for release from prison in exchange for providing information about recent crimes. In this letter defendant listed a number of alleged crimes and purported perpetrators, including his own brother.9/

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9. Exhibit 91 asked the judge to consider reducing defendant's sentence to county time. Defendant mentioned his cooperation with a police officer in solving "robberies, burglaries, drugs as well as firearms." Defendant said he had been threatened because of it and was afraid to come out of his cell.

Exhibit 92 again asked the judge to reconsider his prison sentence, again mentioned his help to the police and fear from threats made against him. Defendant stated: "Sir, I want to say this, there are a lot of crimes I've seen and know about where they involve instances of dangering people's lives and where people have committed bodily harm to people. I also know the big drug dealers. I know of several arsons of firearms and I'm willing to prove I'm still trying to turn straight, by giving this information to the police department"

The People sought to introduce these letters and evidence of a 1972 burglary of a van at Mesa College on the issue of identity. The People's theory was that Eleanore Buchanan interrupted defendant while he was breaking into her van. The reason that he killed her rather than just running off -- as a normal burglar would have done -- was defendant's deathly fear of returning to prison. Defendant had been sent to prison in 1973 after two eyewitnesses to the 1972 burglary had testified against him.

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Footnote 9 continued:

Exhibit 93 asked the district attorney to help him get released on special probation in return for providing information about crimes. It listed about 33 crimes (robbery, burglary, drug offenses) committed in the Kearny Mesa area and the persons responsible. This list includes robberies and burglaries committed by defendant's brother.

Defendant's letters revealed that he was terrified of prison and indicated the lengths to which he would go -- turning in his own brother -- to avoid prison.

The defense objected, asserting that the letters actually showed only defendant's criminal disposition and in any event should be excluded under Evidence Code section 352.[10]

As to the 1972 burglary, the defense contended that there were insufficient distinctive similarities between

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10. These issues were raised during a pretrial hearing. It is not clear whether the trial court was aware that the only murder theory the People would later assert was felony murder. The matter was not mentioned by either side at the hearing. Defendant now argues that since only felony murder was used, there was no issue as to intent. He does not state whether the trial court was aware of that fact at the time of its pretrial ruling. In any event, the court's ruling was based on the relevance of the letters to show motive and identity.

it and the present crime to warrant an inference that they were committed by the same person.

The trial court ruled that the 1972 burglary would not be admitted because it did not share sufficiently distinctive common marks with the current crime. The three letters, however, were ruled admissible on the issue of motive and identity. The court suggested that counsel meet and try to agree on excising portions of the letters that may be irrelevant. Counsel, however, were unable to agree on excising anything more than the names of the judges and district attorney to whom the letters were addressed and the details of the burglary conviction. Defense counsel wanted the details of defendant's information about other crimes excised, but the court agreed with the prosecutor that these details were

necessary to demonstrate the severity of defendant's fear of prison and the lengths to which he would go to avoid prison.

Evidence of a defendant's prior criminal acts is, of course, inadmissible under Evidence Code section 1101 unless it is "relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts." (Evid. Code, § 1101, subd. (b).) the factual relevance, however, must pertain to some issue that is "actually in dispute," and even then the court must exercise its discretion under Evidence Code section 352 and exclude the evidence if its relevancy to prove the

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disputed fact is not of sufficient probative value to outweigh the manifest prejudice of such evidence. (People v. Thompson (1980) 27 Cal.3d 303 314-321.)

Defendant challenges the admissibility of the evidence at every level of analysis. He asserts that it did not tend to show a motive and that even if it did, the motive was not material to any disputed issue. He points out that there was no issue of intent since the only theory of murder presented was felony murder, which requires no finding of intent to kill. He notes that most of the cases which have allowed motive evidence have involved an issue of intent. (See, e.g., People v. Robillard (1960) 55 Cal.2d 88; People v. Durham (1969) 70 Cal.2d 171; People v. Powell (1974) 40 Cal.App.3d 107; People v. Vidaurri (1980) 103 Cal.App.3d 450; People v. Bell (1983) 149 Cal.App.3d 739, 743-743.)

Defendant relies heavily on People v. Alcala (1984) 36 Cal.3d 604, where we found the admission of evidence of prior child molestation offenses by the defendant to have been reversible error. The evidence was not admissible on the issue of identity because there were no sufficiently distinctive similarities between the charged and uncharged crimes to warrant an inference of having been committed by the same person. We also held that the evidence was not admissible to establish a motive for premeditated murder on the ground that the defendant's prior crimes increased his incentive to eliminate the victim as a witness since the prior convictions would aggravate the penalty for the current offense. We refused to adopt such reasoning because it would mean that "one's criminal past could always be

introduced against him." (Id. at p. 635.) We distinguished Durham and Robillard on the ground that the motive of escape was central in those cases where the defendants shot and killed police officers during routine automobile stops.

We agree that it was error to admit these letters. The proffered motive of killing eyewitnesses because of defendant's extreme fear of prison simply does not wash. It rests entirely on speculation on how an assumed "normal" burglar would have behaved after being discovered, which, in turn, is based entirely on speculation on how such a "normal" burglar would have weighed the possiblity of going to prison against the problems associated with the taking of a human life. The jury is then asked to compare this supposed reaction of a

"normal" burglar with the assumed reaction of a person who dislikes prison with the intensity which the defendant's letters imply. It is difficult to imagine a more tenuous chain of inferences on which to base a finding that one person has killed another.

We cannot, however, say that the error in admitting the evidence was prejudicial. At worst the letters showed defendant's prison connection and his knowledge of crime life in San Diego, but they were not in the same league of prejudice as the evidence of molestations in Alcala. Even without the letters, we still would have known that defendant had been convicted of forgery in 1972 and

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burglary in 1973 and that he had a felony case pending when he went to Texas.[11]/

There is also strong circumstantial evidence of defendant's guilt. In addition to his admission to a jailer and a jailhouse informant, we have defendant driving the victim's van and using her credit cards. We also have a

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11. Donna Hatch's testimony referred to the fact that there was such a case pending against defendant when he went to Texas; it will be recalled that he wanted her to testify for him. Defendant's 1972 forgery and 1973 burglary convictions were ruled admissible for impeachment purposes under People v. Beagle (1972) 6 Cal.3d 441 and were so used.

It seems quite clear that defendant's decision to testify was not compelled by the erroneous admission of these letters. There was far more damaging evidence that defendant needed to explain if he were to have any chance of acquittal -- the fabricated story about Fran and Spider, his statements and threats to Donna Hatch, and his possession of the victim's van.

spot of blood on defendant's shoe that is the victim's blood type but not defendant's.

Defendant's admitted fabrication of the "Fran and Spider" story and his explanation for its retraction furnish almost unanswerable evidence of consciousness of guilt with respect to the very victim of the homicide, as well as contact with her.

First, with respect to the explanation: at the outset of the Oklahoma interview defendant had been told that the van had been involved in a homicide. Making up a provably false story just to avoid being accused of having stolen the van, seems extravagant.

More important, however, is the fact that defendant was not told anything about the victim of the homicide. Yet his admittedly false story attempted to

account for the whereabouts of the actual victim whose body, as defendant believed, could not be identified. Further, once it was conceded that the "Fran and Spider" story was a lie, defendant's ability to identify the victim from the picture showing her with her baby, as well as his correct description of her clothes and purse, prove some kind of contact with her. Conversely, none of the defense evidence -- except defedant's bare denials -- was conclusively inconsistent with the People's case.

Under the circumstances, it does not appear reasonably probable that the jury would have reached a more favorable result had these letters not been admitted. (People v. Watson (1956) 46 Cal.2d 818, 836.)

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b. Statement to Deputy Parsons

Defendant contends the trial court prejudicially erred in admitting evidence of the statement defendant made to Deputy Sheriff Parsons: "Yeah, and I'll kill a lot more, too, and you may be first on my list."

Before Deputy Parsons' testimony in front of the jury, an in camera hearing was held on the admissibility of the statement. Counsel objected on the grounds that the statement was solicited by the deputy in violation of Massiah and Miranda, that it was ambiguous and did not constitute a threat or admission. The court ruled that there had been no interrogration by Deputy Parsons and that the statement was admissible as an admission. Defense counsel then sought to have the last portion excluded -- the statement "you may be first on my list."

The court denied the request on the ground that the entire statement was needed to show its essence.

Defendant does not challenge the court's finding of no interrogation. He contends only that the statement was too ambiguous to constitute an admission. The trial court properly rejected defendant's contention. Even though no Evidence Code section 352 objection was raised, the court would not have abused its discretion in admitting the evidence over such an objection. Although defendant did not mention any specific victims, he did admit to having killed someone. Defendant's reliance on People v. Allen (1976) 65 Cal.App.3d 426 is misplaced because the statement there

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required too many levels of speculation to be construed as an admission of guilt.[12]/

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12. In Allen, the defendant was charged with the theft of jewelry that was missing after he had spent the night with the victim. The defendant had awakened the victim during the night and told her that someone had been in the apartment and that he had chased the intruder out. Over the defendant's objection, the victim testified that defendant had stated he had ways of finding out where the stolen jewelry was if anyone attempted to sell it and that he made a phone call in which he stated that he wanted to be informed if the jewelry was sold. The testimony was admitted on the theory that such staements constituted an implied admission that the defendant and a confederate had stolen the jwelry, but, after second thoughts, were attempting to return it to the victim.

The Court of Appeal held the statements were improperly admitted as an implied admission of defendant that he had stolen the jewelry because any inference to that effect was too speculative and unreasonable to meet the test of relevance. (People v. Allen, supra, 65 Cal.App.3d at pp. 433-435.)

The statement here, by contrast, required no speculation to connect it to the issue of whether defendant had killed Mrs. Buchanan.

c. Letter to Theresa Roch

Defendant contends that the trial court prejudicially erred in admitting a letter -- not previously mentioned -- written by him to Theresa Roch. He claims that there was no evidence to show that he had authorized the threat to witnesses referred to in the letter. During argument on the admissibility of the letter, defense counsel conceded that a foundation had been laid and stated that he would have no objection to the letter being received into evidence if the portion referring to the threats were excised. That portion read: "By the way, today I got news from Quack. He says he knows I am innocent but also

knows how I will get railroaded, so if I lose this case, they will take out O'Conner [defense attorney], Sexton [prosecutor], McArdle [prosecutor] and Armstrong [criminalist], and at least one member of their family [¶] I don't like the idea of violence, since I have never been a violent person, and the proposal seeks my agreement. I haven't sent answers as of yet, because I have to consider a lot of things before I do. [¶] I don't like the idea, but I also don't like the idea of sitting on someone's murder charge, so that leaves me a lot to think about. Anyway, time has finally slowed down, but now, there is a lot going on."

The prosecutor asserted that the letter was relevant to show an attempt to intimidate the prosecutors and the criminalist. He noted that defendant

had mentioned in an earlier letter to Terry Buchanan that he knew the authorities were copying his mail. In light of this knowledge, the mention of the threat -- despite defendant's stated reluctance to agree to it -- constituted an attempt to intimidate the persons mentioned. The court apparently agreed and admitted the letter.

Defendant relies on People v. Hannon (1977) 19 Cal.3d 588 and People v. Weiss (1958) 50 Cal.2d 535 in asserting that the letter should not have been admitted in the absence of evidence indicating that he had authorized the threats by "Quack." Defendant misunderstands the basis on which the letter was admitted. It was the fact that defendant knew that his letter would be copied and read by the authorities that transformed the

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reference to threats by "Quack" into a subtle attempt at intimidation by defendant.

Defendant also asserts that the court should have excluded the letter under Evidence Code section 352 even though that claim was never raised at trial. He presents no pertinent authority in support of the assertion that the trial court had a sua sponte duty to consider exclusion under section 352.

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D. Admission of Saw, Knife and Twine

Defendant contends the court prejudicially erred in admitting a saw (pruning type), butcher knife and two shanks of twine that he had bought in Texas on June 6 and 7, after the murder of Mrs. Buchanan. At the hearing on the admissibility of the items, defense counsel argued that they were only marginally relevant to defendant's threats to kill Donna Hatch and that it would be impossible for the jury to limit its consideration to their relevance to threats against Hatch.

The prosecutor argued that the evidence had two purposes. The first was a narrow one of showing defendant's consciousness of guilt in that defendant bought these items to use in killing Donna Hatch, who, after their falling-

out, had become a serious threat as a witness because of the incriminating things defendant had said to her. Defendant's consciousness of guilt was also shown by the fact that when questioned after his arrest, he denied any connection with the saw, claiming "Spider must have bought it."

The larger purpose of the evidence was to show defendant's identity as the killer of Mrs. Buchanan. The items, which inferably were to be used in killing Donna Hatch, were similar to the tools used on Mrs. Buchanan -- dead or alive.

The court acknowledged the potential prejudice but concluded that the probative value of the evidence was sufficient to warrant its admission in light of the unusual factors of the cutting off of the victim's head and

hands: "The circumstances are about as unique and different as any case that I have ever seen and there are certain earmarks of the case that seem to be closely related with the possibility that the defendant may have intended to do something along the same lines to some other person who was standing in his way; that is, who was a threat to him as far as his liberty was concerned, and it is so unusual that it seems to be a circumstance which might well show a consciousness on the part of the defendant of his guilt . . . ."

The cases on which defendant relies are distinguishable from the present situation in that they involved the admission of weapons found in the defendant's possession that could not have been the ones used in the crime and were

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not admitted for any other relevant purpose. (People v. Riser (1956) 47 Cal.2d 566; People v. Henderson (1976) 58 Cal.App.3d 349.) No abuse of discretion appears in the court's ruling here.

e. Preliminary Hearing Testimony of Steve Terry

Defendant contends he was denied his right of confrontation by the use of one Steve Terry's preliminary hearing testimony at trial. Terry was an employee of Stuckey's in Oklahoma where defendant had used one of the victim's credit cards. He had testified that defendant ran out of the store before approval for the credit card purchase could be obtained. Terry notified the police and gave a description of defendant and the vehicle. It was this call that ultimately led to defendant's arrest.

Terry had been a cooperative witness. The district attorney's investigator had been in regular touch with him and had served him with a subpoena by mail. His last contact with Terry was July 15, 1980, when he advised Terry that the August 12, 1980, trial date had been continued. The investigator learned two weeks before trial that Terry was no longer employed by the Stuckey Corporation, that he and is wife had separated and that he had left the town of Marietta, Oklahoma. An Oklahoma sheriff's department employee testified that she had attempted unsuccessfully to locate Terry. She had checked with the post office, the electric company and had attempted to contact Terry's wife's parents.

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Defendant contends the trial court erred in finding that the prosecution had exercised due diligence since it never used the Uniform Act to Secure Attendance of Witnesses. He relies on People v. Blackwood (1983) 138 Cal.App.3d 939, where the Court of Appeal held that the trial court had erred in finding a witness unavailable when the prosecution had made vigorous efforts to find the witness but had not attempted to use the uniform act.

The present situation is distinguishable from that in Blackwood where the witness had been located but refused to cut short an Alaskan vacation to appear at trial. In Blackwood, the prosecutors had made no effort to use the uniform act to obtain interstate process because they thought it unlikely that Alaska would have issued a subpoena

because of the undue hardship on the witness. Here, by contrast, the prosecution had a cooperative witness who unexpectedly disappeared two weeks before trial. (Cf. People v. Masters (1982) 134 Cal.App.3d 509 [prosecution unjustified in relying on uncooperative witness's promise to appear].) Since Terry could not be located after his unexpected disappearance, it would have been pointless to have used the uniform act. (See Ohio v. Roberts (1979) 448 U.S. 56.)

In any event, any error in admitting Terry's preliminary hearing testimony was clearly harmless beyond a reasonable doubt. (See People v. Blackwood, supra, 138 Cal.App.3d at 947.) Terry's testimony was peripheral and could not have affected the verdict.

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4. Special Circumstance Findings

Defendant contends that the special circumstance findings must be set aside and the penalty reversed for the court's error under Carlos v. Superior court (1983) 35 Cal.3d 131, in failing to instruct on the necessity for intent to kill in the felony-murder special circumstances. We agree. In People v. Garcia (1984) 36 Cal.3d 539, we held Carlos error reversible per se with four limited exceptions: (1) if the erroneous instruction was given in connection with an offense for which the defendant was acquitted; (2) if the defendant conceded the issue of intent; (3) if the factual question posed by the instruction was necessarily resolved adversely to the defendant under other, properly given instructions, (4) where the evidence

establishes intent to kill as a matter of law and shows no evidence to the contrary that is worthy of consideration. (Id. at pp. 554-556.)

In this case the only theory of murder on which the jury was instructed was felony murder which, of course, does not require a finding of intent to kill. Thus the only potentially relevant exception to the Garcia rule of automatic reversal is the fourth -- the so-called Thornton-Cantrell exception. The evidence does not support its application here. As noted, the coroner was unable to determine the cause of death or whether the victim's head and hands were cut off before or after death. The one stab wound that had been inflicted before death was nonfatal. Although the evidence would arguably support a finding of intent to kill had proper instructions

been given, it manifestly does not establish intent to kill as a matter of law. The victim might have been killed accidentally, with defendant deciding afterwards to mutilate the body in an attempt to prevent identification.[13] We simply do not have enough evidence as to the circumstances of the victim's death to be able to conclude that intent to kill was established as a matter of law.

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13. The fact that the victim's wrists and ankles had been tied does not alter this; death could have occurred accidentally while she was tied up.

III DISPOSITION

The findings of special circumstances are set aside and the judgment is reversed insofar as it relates to penalty; in all other respects the judgment is affirmed.

* KAUS, J.

WE CONCUR:

BROUSSARD, J.

REYNOSO, J.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairperson of the Judicial Council.

C O P Y

PEOPLE v. BERNARD LEE HAMILTON

Crim. 21958

CONCURRING OPINION BY GRODIN, J.

I agree that the principles this court adopted in People v. Garcia (1984) 36 Cal.3d 539, which were in turn based on federal constitutional principles, compel reversal of the special circumstances finding for Carlos error, and I therefore concur.

Justice Lucas' dissent is appealing.1/

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1. Part of what I say here is applicable also to the concurring and dissenting opinion by Justice Mosk. Justice Mosk accepts both Carlos and Garcia, but would affirm the judgment on the ground that intent to kill was "manifest from the facts and no evidence was introduced by defendant that might raise a reasonable doubt on that issue." He makes no attempt, however, to explain how this conclusion fits within the analytical framework of Garcia. (See discussion, post, pp.___ - ____ [typed opn., pp. 6-7]; compare People v. Anderson (1985) 38 Cal.3d 58, 61-62.)

However the killing occurred, the circumstances were certainly brutal, and from the record on review I agree that had the question of intent been put to the jury it is unlikely that its verdict would have been otherwise. From that perspective, the dissent's suggestion that the judgment does not represent a "miscarriage of justice" within the meaning of the California Constitution (art. VI, § 13) may well have merit.

But there are several flaws in the dissent's analysis. The first is its failure to recognize that Garcia is premised squarely on principles of federal constitutional law as declared by the United States Supreme Court in Connecticut v. Johnson (1983) 460 U.S. 73. As we observed in Garcia, Connecticut v. Johnson reveals that "at least eight

justices of the United States Supreme Court . . . agree that a jury instruction which does take an issue completely from the jury is reversible per se. We have no doubt that they would reach the same conclusion if the error was one of omission -- failing to submit the issue of intent to the jury. Both forms of error have the same effect: removing the issue wholly from jury determination, and thus denying defendant the right to jury trial on the element of the charge." (People v. Garcia, supra 36 Cal.3d at p. 554.) Garcia concluded that Carlos error is reversible per se subject to four familiar exceptions, one of which (the so-called Cantrell-Thornton exception) was not based upon any language in Connecticut v. Johnson but was, we thought, compatible with the principles announced in that case.

The Attorney General sought review of this court's decision in Garcia by petition for certiorari to the United States Supreme Court, but review was denied. (105 S.Ct. 1229.) Subsequently, the high court granted review in Engle v. Koehler (6th Cir. 1983), a case involving the test of prejudice for Sandstrom error (Sandstrom v. Montana (1979) 442 U.S. 510 [in which the jury was instructed that "[t]he law presumed that a person intends the ordinary consequences of his voluntary acts"]), but the appeal in that case was summarily affirmed by an equally divided court. (Koehler v. Engle (1984) 104 S.CT. 1673.) The high court has since avoided the same issue in Francis v. Franklin (1985) 105 S.Ct. 1965, 1977, and has declined to grant certiorari in another case posing the Sandstrom -Connecticut v. Johnson prejudice issue.

(See Davis v. Kemp (11th Cir. 1985) 752 F.2d 1515, cert. den., 105 S.Ct. 2689, and White, J., dis. at pp. 2690-2691.) Thus, if this court was wrong in Garcia, the Supreme Court has yet to say so.

Nor, for that matter, do I believe we can take guidance in our Carlos-Garcia cases from the federal circuit courts' treatment of Sandstrom-Connecticut v. Johnson error.2/

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2. A number of pre-Connecticut v. Johnson cases addressed the prejudice issue. See, e.g., the 11 cases discussed in Connecticut v. Johnson, supra, 460 U.S. 73, 75, footnote 1. Post-Connecticut-Johnson cases include: Engle v. Koehler (6th Cir. 983) 707 F.2d 241 (reversing; defendant claimed diminished capacity), affd. by an equally divided court, 104 S.Ct. 1673 (mem.); Franklin v. Francis (11th Cir. 1983) 720 F.2d 1206 (reversing; defendant claimed diminished capacity), affd., 105 S.Ct. 1965, 1977 (declining to rule on the standard of prejudice); Petition of Hamilton (9th Cir. 1983) 721 F.2d 1189 (reversing; defendant claimed self-defense and diminished capacity); Fulton v. Warden, Md. Penitentiary (4th Cir. 984) 744 F.2d 1026

Although the reasoning of those cases is not always consistent, the above-cited courts often have affirmed in the face of Sandstrom-Connecticut v. Johnson error upon finding that (i) the defendant actually or impliedly "conceded" the issue of intent by putting on a particular defense and thereby

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Footnote 2 continued:

(affirming; defendant claimed alibi); Davis v. Kemp (11th Cir. 1985) 752 F.2d 1515 (en banc) (affirming; defendant claimed noninvolvement), cert. den., 105 S.Ct. 2659; McCleskey v. Kemp (11th Cir. 1985) 753 F.2d 877 (affirming; defendant claimed alibi); Brooks v. Kemp (11th Cir. 985) 762 F.2d 1383 (en banc) (reversing; defendant claimed noninvolvement and accident); Tucker v. Kemp (11th Cir. 1985) 762 F.2d 1496 (en banc) (affirming; defendant claimed noninvolvement); Hagler v. Callahan (9th Cir. 1985) 764 F.2d 711 (affirming; defendant claimed alibi); Church v. Kincheloe (9th Cir. 1985) 767 F.2d 639 (affirming; defendant claimed mistake of fact); Bowen v. Kemp (11th Cir. 1985) 769 F.2d 672 (affirming although defendant claimed insanity). See also Guyton v. Lefevre (S.D.N.Y. 1983) 560 F.Supp. 1237 (affirming; defendant claimed alibi).

failing to put his mens rea in issue and (ii) that the record establishes the defendant's intent "overwhelmingly." Although these cases suggest an appealing solution to Sandstrom-Connecticut v. Johnson error, I must conclude they do not assist our Carlos-Garcia analysis for two reasons.

First, it is not clear to me that the federal circuit court cases give due consideration to what we emphasized in Garcia -- the effect of an evidentiary void created by the very instructional error in question. (36 Cal.3d at p. 556.) Specifically, none of the federal cases explain why it is permissible to consider whether the record establishes the defendant's intent when, by the instructions given, the defendant had little (if any) incentive to put on such evidence if he had it. Therefore, I am

not convinced that the United States Supreme Court would endorse the course taken by the federal circuit courts in Sandstrom-Connecticut v. Johnson error cases. As noted, the high court has yet to rule on the issue.

Second, even assuming the federal circuit courts are correct in their implicit holdings that a Sandstrom-Connecticut v. Johnson defendant can be deemed to have had some incentive to put on lack-of-intent evidence (and therefore an appellate court may properly review the record as it exists to determine whether intent is proved "overwhelmingly"), I strongly question whether the same incentive to produce such evidence can be deemed to have existed in Carlos-Garcia cases. The difference between the two situations is significant. Jurors in Sandstrom-

Connecticut v. Johnson error cases have been erroneously instructed in a variety of ways, but they have essentially been left with the impression that, although intent needed to be proved, the defendant's acts conclusively proved his intent, or that it was the defendant's burden to disprove his intent. In such a situation an appellate court might reasonably conclude that a defendant, knowing that such an instruction on intent would be given, nevertheless had a significant incentive to put on lack-of-intent evidence, if any he had. Jurors in Carlos-Garcia cases, on the other hand, have been given instructions that omit intent to kill as an element of a special circumstance. In this situation an appellant court cannot (except perhaps in rare situations) reasonably conclude that a defendant, knowing instructions

omitting intent as an element would be given, nevertheless had an incentive to put on lack-of-intent evidence he may have had. With this latter proposition, even the Connecticut v. Johnson dissenting justices agree: As Justice Powell stated for three of his colleagues, an instruction that removes the issue of intent from the jury's consideration precludes an appellate court from determining whether the error was harmless. (103 S.Ct. at pp. 982-983.)

The dissent in the present case, purporting to apply Garcia analysis, advances a dual approach for avoiding reversal: (1) on the record as it stands, intent to kill is clear; and (2) we can be satisfied that even if defendant had been aware that intent was an issue in the special circumstances phase of his trial the record would have

been no more favorable to him on that point. The first aspect of the dissent's argument is adequately treated in the majority's opinion; I focus here on the second.

The dissent argues that although intent to kill was not relevant during the guilt phase, defendant had a strong incentive to present evidence showing lack of intent at the penalty phase, and because he did not do so we may safely assume no such evidence exists.

The dissent makes no attempt to fit this argument into the Garcia framework of analysis. I assume that if it were to fit anywhere, it would be within the Cantrell-Thornton exception But that exception requires, as a threshold matter, that the parties have "recognized" intent as an issue, and

"presented all evidence at their command on that issue." (People v. Garcia, supra, 36 Cal.3d at p. 556.) Obviously, defendant did not "recognize" intent to be an issue at the special circumstances phase since, under the court's instructions, it was plainly not. I gather what the dissent is suggesting is that the "intent recognized" requirement of the Cantrell-Thornton exception should be deemed met on the basis that defendant had an incentive, at the penalty phase, to present evidence bearing on lack of intent in mitigation so that the evidentiary void on this subject in fact represented "all the evidence at [his] command."

Perhaps there are cases in which the incentive to come forward with evidence bearing on intent at the penalty phase is so clear that it may be said

with positive assurance that the defendant, properly represented, would have done so, but such a conclusion entails the assumption that competent counsel would have had no tactical reason to withhold such evidence had it been available. I do not believe we can make that assumption here. Here, as in many cases, defendant had every reason at the penalty phase to attempt to turn the jury's attention away from the facts of the underlying crime and direct it instead towards his family background and positive relationships and conduct. Even if he had evidence which -- if introduced at the special circumstance stage -- might have raised a reasonable doubt on the intent to kill issue, his counsel might well have concluded that, since no finding of intent to kill beyond a reasonable doubt was required at the penalty

phase, little would be gained by redirecting the jury's focus at that point towards defendant's conduct which resulted in the victim's death. Reopening the facts of the crime may well have detracted from defense counsel's effort to have the jury conduct an overview of his life in determining whether he should live or die. Thus, the absence of evidence in this regard at the penalty phase does not demonstrate that there is no such evidence that could have been presented.3/

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3. I would be prepared to depart from rigid application of the "intent recognized" requirement and affirm on the record as it stands, were it inconceivable that any reasonable juror would have found the defendant lacked intent to kill, no matter what evidence (other than evidence of diminished capacity) he might have produced on that issue. In such a case I would affirm the penalty verdict contingent on defendant's right to present diminished capacity evidence, if any he has, in a habeas corpus proceeding. Again, this is not such a case.

Perhaps the United States Supreme Court will grant certiorari in this or another case and tell us we were wrong in Garcia, but until it does our obligation is to apply the law as we find it. I concur in the judgment.

GRODIN, J.

C O P Y

PEOPLE v. HAMILTON

Crim. 21958

CONCURRING OPINION BY BIRD, C.J.

I concur fully in Justic Kaus's fine opinion.

Since the special circumstance findings and penalty judgment must be reversed as a result of the trial court's error under Carlos v. Superior Court (1983) 35 Cal.3d 131, the majority correctly decline to note the existence of other special circumstance or penalty phase issues which might require reversal of those verdicts.

In this case, the trial court gave the so-called "Briggs commutation instruction" that this court has held invalid on state due process grounds in People v. Ramos (1984) 37 Cal.3d 136. In

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addition, the trial court failed to exercise its discretion to strike the special circumstance finding under People v. Williams (1980) 30 Cal.3d 470. Since these issues might require reversal, the final vote in this case does not reflect the views of the justices on these errors.

BIRD, C.J.

C O P Y

PEOPLE v. HAMILTON

Crim. 21958

CONCURRING AND DISSENTING OPINION
BY LUCAS, J.

I concur in the majority opinion to the extent it affirms defendant's conviction of first degree murder, burglary, robbery and kidnaping. I respectfully dissent, however, to the setting aside of the special circumstances finding and penalty judgment.

The majority relies upon People v. Garcia (1984) 36 Cal.3d 539, and Carlos v. Superior Court (1983) 35 Cal.3d 131, in concluding that the failure to instruct the jury regarding intent to kill was prejudicial error requiring us to set aside the special circumstances finding and the penalty judgment. For reasons I have previously explained, I

strongly disagree with the holdings in those cases (see People v. Whitt (1984) 36 Cal.3d 724, 749 [dis. opn.]), and I can no longer concur in judgments which reverse special circumstances findings under their compulsion (see People v. Guerra, ____ Cal.3d ____,_____ [dis. opn.]).

The concurring opinion by Justice Grodin reluctantly agrees that Carlos/Garcia principles apply here. He attempts to place responsibility for those cases upon the shoulders of the United States Supreme Court and its fragmented decision in Connecticut v. Johnson (1983) 460 U.S. 73, a case which appears to impose a per se reversal rule whenever the issue of intent is improperly removed from the jury's consideration. I have no quarrel with that case, whatever principle may be gleaned

from the various opinions written therein. My principal quarrel is with Carlos itself, wherein my colleagues rewrote Penal Code section 190.2, subdivision (a)(17), and introduced an "intent to kill" requirement which was mandated by neither state nor federal law. (See Carlos v. Superior Court, supra, 35 Cal.3d 131, 156-159 [dis. opn. by Richardson, J.].) As we proceed to reverse one death penalty judgment after another on Carlos grounds, let us not assign the blame to some other court -- the fault is ours. I continue to urge reconsideration and disapproval of that unfortunate decision.

But even were Carlos considered "good law," it does not require setting aside the special circumstances finding in this case. Here, defendant's intent to kill was established as a matter of

law, and no contrary evidence was introduced which might raise a possible doubt on the issue.

As the majority acknowledges, defendant's victim was stripped to her underwear, bound hand and foot, repeatedly stabbed, partially dismembered and finally decapitated. At least one stab wound, to the stomach, probably occurred prior to her death. The majority postulates, however, that "The victim might have been killed accidentally, with defendant deciding afterwards to mutilate the body in an attempt to prevent identification. [Fn. omitted.] We simply do not have enough evidence as to the circumstances of the victim's death to be able to conclude that intent to kill was established as a matter of law." (Ante, p. ___ [maj. opn. at pp. 40-41].)

To the contrary, I suggest that the condition of Mrs. Buchanan's body amply established an intent to kill in the absence of any evidence in the record supporting the majority's accidental death theory. We cannot reverse a judgment, even a death penalty judgment, based on nothing more than mere speculation or surmise. (See Cal. Const., art. VI, § 13 [requiring a "miscarriage of justice"].)

It is simply inconceivable that, if the killing were indeed "accidental," defendant would have neglected to attempt to prove that fact. Although lack of intent to kill was not relevant during the guilt phase, it would have been a strong mitigating factor at the penalty phase of the trial. (See Pen. Code, § 190.3, subds. (a) [circumstances of the crime], (d)

[extreme mental or emotional disturbance], (f) [reasonable belief killing was justified], (g) [extreme duress], (h) [impaired capacity to appreciate criminality of conduct or conform to law], and (k) [any other extenuating circumstance].) Yet, defendant's penalty phase evidence was limited to general character and background evidence, and pleas by defendant's friends and relatives to spare his life. Can there be any reasonable doubt whatever that defendant would have presented evidence bearing on his lack of intent to kill had there been any such evidence to present?[1]

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1. Justice Grodin, in his concurring opinion, speculates that trial counsel may have had a tactical reason for failing to raise potentially mitigating evidence regarding defendant's lack of intent to kill. Any such "tactics" would border upon incompetence in light of the absence of any other significant mitigating evidence presented

My colleagues continue to reverse capital cases on Carlos/Garcia grounds, despite the fact that in many of these cases it is readily apparent that the defendant possessed the requisite intent to kill, and that a failure to instruct on that issue was, at worst, harmless error.

I would affirm the judgment in its entirety.

LUCAS, J.

Footnote 1 continued:

at the penalty phase. I believe we should assume the more logical explanation -- that no such evidence existed -- and reserve to defendant his right to contradict that assumption in a habeas corpus proceeding.

C O P Y

PEOPLE v. BERNARD HAMILTON

Crim. 21958

CONCURRING AND DISSENTING OPINION
BY MOSK, J.

I concur in the majority opinion to the extent it affirms defendant's conviction of first degree murder, burglary, robbery and kidnaping, but I dissent to the setting aside of the special circumstances finding and the penalty.

I cannot join in Justice Lucas' criticism of Carlos v. Superior Court (1983) 35 Cal.3d 131. Even if one be disillusioned by the number of penalty reversals required by that decision and by People v. Garcia (1984) 36 Cal.3d 539, stare decisis and respect for the judicial process require adherance to decisions rendered so recently by a

substantial majority of this court. A petition for certiorari in the United States Suprene Court was sought by the Attorney General in Garcia, and review in the high court was denied. (105 S.Ct. 1229.) Thus Carlos-Garcia remains the law in California.

I agree with Justice Lucas, however, that even under Carlos, we need not set aside the special circumstance finding in this case. Intent to kill was manifest from the facts and no evidence was introduced by defendant that might raise a reasonable doubt on that issue.

Therefore I would affirm the judgment in its entirety.

MOSK, J

EDITOR'S NOTE

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Supreme Court, U.S.
FILED
JUN 5 1986
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1853

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BERNARD LEE HAMILTON,

Respondent.

ON A PETITION FOR WRIT OF CERTIORARI

RESPONDENT'S BRIEF IN OPPOSITION AND MOTION TO PROCEED IN FORMA PAUPERIS

BARRY L. MORRIS
Attorney at Law
580 Grand Avenue
Oakland, California 94610
415-839-1288
Attorney for Respondent

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, BERNARD LEE HAMILTON, respectfully requests that this Court deny the petition for writ of certiorari.

A.

Introduction

In its petition for writ of certiorari, petitioner attacks the ruling of the California Supreme Court in the

instant case on two bases: Petitioner contends that the California Supreme Court improperly ruled that the California death penalty law required a finding of "intent to kill" under the compulsion of Enmund v. Florida, 458 U.S. 782 (1982), and that the court's ruling on the standard of prejudice based upon Connecticut v. Johnson, 460 U.S. 73 (1983) was improper in view of this Court's ruling in Cabana v. Bullock, 474 U.S. _____, 106 S.Ct. 689 (1986). It is respondent's position that the California Supreme Court's ruling on "intent to kill" was based strictly on that court's interpretation of state law, and that the court correctly applied the principles of Connecticut v. Johnson in determining the appropriate standard of prejudice.

B.

The Ruling of the California Supreme Court Requiring that "Intent to Kill" be Shown in Order to Establish a Special Circumstances was Based Strictly on State Law

In the instant case, the jury was not instructed that they must find that respondent "intended to kill" the victim before they could find that the special circumstances alleged in the instant case were true. On the basis of its decision in Carlos v. Superior Court, 35 Cal.3d 131 (1983), the Supreme Court of California reversed respondent's conviction. People v. Hamilton, 41 Cal.3d 408 (1985).

The death penalty law under which respondent was prosecuted was adopted by initiative in 1978. It embodies a two-stage proceeding for a capital trial which confers upon a capital defendant the right to a jury determination of guilt, the truth of the special circumstances alleged and penalty. In the first stage, the jury is instructed that they must first determine whether or not the defendant is guilty of first degree murder, and that if they arrive at such a conclusion, they must then determine whether or not the murder was of a

type described in one of 19 categories of "special circumstances." Only if the jury determines beyond a reasonable doubt that the murder was a "special circumstance" murder do they go on to the second stage, which is the penalty determination. (California Penal Code section 190 et seq.)

In Carlos v. Superior Court, supra, the California Supreme Court examined the statutory scheme enacted by the voters in 1978 to determine whether or not "intent to kill" was required where the special circumstance alleged was a felony murder (robbery) special circumstance. In 10 of the 19 special circumstances listed, the statute clearly requires proof of intent to kill. In subdivision 17 of the special circumstance law, the felony murder special circumstance, the statute does not expressly articulate a requirement of proof of "intent to kill". The Court noted, however, that construing that paragraph without an intent to kill requirement would have "anomalous results":

> "Five of the felonies listed in that paragraph: arson, rape, robbery, burglary and child molesting -- also appear in section 189, the statutory felony murder provision. As to these offenses, an unintentional killing in perpetration of the felony, raised to first degree murder by operation of section 189, would without further proof constitute a special circumstance under paragraph 17. The remaining four felonies -- kidnapping, sodomy, oral copulation, and train wrecking -- are not enumerated in section 189. Since it is clear that in virtually every case an intent to kill would be required to render a death occurring the course of one of these four felonies a first degree murder -- a prerequisite to any special circumstance finding (section 190.2, subd. (a)) -- a defendant who kills unintentionally during the commission of those offenses is not subject to the death penalty or imprisonment without possibility of parole." 35 Cal.3d at 140-141 (footnotes omitted)

If the statute were construed literally, the result would be,

> "difficult to defend. A defendant who killed unintentionally during a robbery or rape could be convicted of first degree murder with special circumstances and executed, while one who killed unintentionally during a kidnapping for robbery or forceable sodomy could not be convicted of first degree murder and thus could not be executed." Ibid.

The Court noted that section 190.2(b) provides,

> "Every person whether or not the actual killer found guilty of intentionally aiding and abetting . . . any actor in the commission of murder in the first degree shall suffer death or confinement in state prison for a term of life without possibility of parole,"

and that for most of the special circumstances, including subdivision 17,

> "A uniform and sensible interpretation of the subdivision would read it as imposing an intent to kill requirement for the accomplice to any felony murder, and by implication such a requirement for the actual killer himself." 35 Cal.3d at 142.

After reviewing the history and purpose of the 1978 initiative, the Court concluded,

> "that the history of the initiative, as well as its wording, supports a construction limiting the felony murder special circumstances to persons who intend to kill or aid in a killing."

The Court reasoned that although the language of the 1978 initiative, "indicates, but does not compel, the conclusion that intent to kill is required . . .," the rules of statutory construction serve to, "reinforce our view that the statute does not permit punishment of an unintentional felony murder by death or life imprisonment without possibility of parole." Id., at 147.

Petitioner's repeated assertions that Carlos is predicated on a misinterpretation of federal law (Pet. 19, 29) are simply wrong. Although the Carlos Court reviewed federal precedents, it did so only under the general principle that a

court,

> "when faced with an ambiguous statute that raises serious constitutional questions, should endeavor to construe the statute in a manner which avoids any doubt concerning its validity. Id., at 147.

The California Supreme Court did not rule that the statute violated the principles of Enmund, but instead simply noted that,

> "The question of whether the felony murder special circumstance can constitutionally be applied to any defendant, including the actual killer, who did not intend or contemplate a killing appears to be a substantial and as yet unsettled constitutional issue under the Eighth Amendment." Id., at 151 (emphasis added)

In short, the California Supreme Court did not hold that a statute lacking a requirement of intentionality was unconstitutional under the Federal Constitution. Rather, as a matter of state law, it:

> "construe[d] the word 'intentionally' in subdivision (b) of section 190.2 to apply to all defendants -- actual killers and accomplices alike -- and to require an intent to kill before a defendant is subject to a special circumstance finding under paragraph 17 of that section." Id. at 153-154.

C.

The California Supreme Court Correctly Applied this Court's Test of Prejudice as Outlined in Connecticut v. Johnson

The California Supreme Court ruled in the instant case that the trial court's failure to instruct the jury that they must find "intent to kill" before they could find the allegations of special circumstances to be true was prejudicial under the standard of prejudice outlined in People v. Garcia, 36 Cal.3d 539 (1984). In Garcia, the California Supreme Court reviewed this Court's decision in Connecticut v. Johnson, supra, and concluded that it established the rule that where a

factual matter that should have been decided by the jury was removed from its consideration by a trial court's instruction, the error was reversible per se.

> "At least eight justices of the United States Supreme Court (all except Justice Stevens, who took no position on the issue) agreed that a jury instruction which does take an issue completely from the jury is reversible per se. We have no doubt that they would reach the same conclusion if the error was one of omission -- failing to submit the issue of intent to the jury." Garcia, supra, 36 Cal.3d at 554.

The California Supreme Court went on to establish a harmless error test which provides that the error is reversible per se unless one of four exceptions is present:

> "1. The erroneous instruction was given in connection with an offense for which the defendant was acquitted and . . . the instruction had no bearing on the offense for which he was convicted";
>
> "2. The defendant conceded the issue of intent";
>
> "3. The factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions"; or
>
> "4. Where the parties recognized that intent to kill was an issue, presented all evidence at their command on that issue, and the record not only establishes the necessary intent as a matter of law but shows the contrary evidence not worthy of consideration". 36 Cal.3d at 554-556.

In its petition for writ of certiorari, petitioner takes the view that this Court's recent decision Cabana v. Bullock, supra, "indicates that the California Supreme Court's reliance on Connecticut v. Johnson in Garcia was misplaced." (Pet. 26). Petitioner is wrong.

First, in Cabana, supra, the defendant was convicted under a Mississippi statute which, as construed by the Mississippi Supreme Court, did not require proof of intent to kill before the death penalty could be imposed. The Fifth

Circuit granted the defendant's petition for habeas corpus on the ground that he was convicted and sentenced to death without requiring the jury to find that he intended to kill, in violation of the principles of Enmund. This Court reversed on the ground that where state law does not require proof under its own statutory scheme of intent to kill before the death penalty can be imposed, Enmund does not mandate that a jury make that finding.

> "[I]f a person sentenced to death lacks the requisite culpability, the Eighth Amendment violation can adequately be remedied by any court that has the power to find the facts and vacate the sentence. Cabana, supra, 106 S.Ct. at 697.

This Court specifically noted that where the requirement of "intent to kill" is established by state law, "the due process clause implies that appellate findings do not suffice to protect that entitlement." Id., at 697-698, n.4.

Clearly, Cabana did not apply to the instant case because the "intent to kill" requirement was imposed by the California Supreme Court as a requirement of state statutory interpretation, not federal constitutional law.

Second, the requirement that the jury find "intent to kill" under the California death penalty law is not part of the sentencing proceedings, but rather is part of the guilt phase trial. As noted above, under California law a jury is required to find intent to kill, along with a finding of guilt of first degree murder, before it may consider the question of whether or not a defendant should receive life without parole or the death penalty. Put another way, the determination of whether or not a defendant acted with intent to kill is a separate and distinct prerequisite to the penalty determination.

Petitioner's assertion that, "[i]n the present case, we are not dealing with the elements of an offense," and its

characterization of special circumstances as, "a sentencing consideration" (Pet. 33) misrepresents the function of special circumstances within the California statutory scheme, as that role has been interpreted by the State Supreme Court. In People v. Superior Court (Engert), 31 Cal.3d 797 (1982) and Ramos v. Superior Court, 32 Cal.3d 26 (1982) the California Supreme Court made it clear that the elements of special circumstances are equivalent to the elements of a crime and that murder with special circumstances is an aggravated form of murder carrying its own drastically increased punishment (life without possibility of parole instead of 20 years to life) whether or not the prosecution seeks the death penalty as punishment.

As the California Supreme Court stated in Engert,

> "We must reject the People's argument that when the jury is determining the truth of the charged special circumstances, it is exercising a sentencing function and that, therefore, the requirements of due process for narrowness and clarity are lessened. (See People v. Thomas (1979) 87 Cal.App.3d 1014, 1022-1024 [151 Cal.Rptr. 483].) Proceedings do not move into the penalty, or sentencing, phase until after a defendant is convicted of first degree murder and the special circumstance is found to be true. (Pen. Code, §§ 190.1, 190.2.) In the California scheme the special circumstance is not just an aggravating factor: it is a fact or set of facts, found beyond reasonable doubt by a unanimous verdict (Pen. Code, § 190.4), which changes the crime from one punishable by imprisonment of 25 years to life to one which must be punished either by death or life imprisonment without possibility of parole. The fact or set of facts to be found in regard to the special circumstance is no less crucial to the potential for deprivation of liberty on the part of the accused than are the elements of the underlying crime which,when found by a jury, define the crime rather than a lesser included offense or component. Thus, there is no reason why due process should not require the same specificity in defining the special circumstance that it requires in the definition of the crime itself." (footnote omitted) 31 Cal.3d at 803.

In Ramos, the California Supreme Court held that special circumstances are equivalent to an offense and are subject to the same challenges under Penal Code section 871 and 995 (motions to dismiss the information for insufficiency of supporting evidence) as other criminal charges, even in cases where the prosecutor was not seeking the death penalty. 32 Cal.3d at 32-34

It is thus clear that under California state law special circumstances come within that category of cases which are not covered by the ruling in Cabana.

> "A defendant charged with a serious crime has the right to have a jury determine his guilt or innocence, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and a jury's verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Findings made by a judge cannot cure deficiencies in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See Connecticut v. Johnson, 460 U.S. 73, 95, and n. 3, 103 S.Ct. 969, 982, and n. 3, 74 L.Ed.2d 823 (1983) (POWELL, J. dissenting); cf. Beck v. Alabama, 447 U.S. 625, 645, 100 S.Ct. 2382, 2393, 65 L.Ed.2d 392 (1980); Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); id., at 22, 99 S.Ct., at 239 (POWELL, J., dissenting)." Id., at 696

Petitioner's assercion that Cabana suggests that "An erroneous finding on a special circumstance was not the type of error covered by Connecticut v. Johnson" (Pet. 21) represents a misinterpretation of California decisional law and misreading of Cabana. There is therefore no reason why this court's review of the decision of the California Supreme Court is warranted. Indeed, petitioner previously sought review of this identical issue in the Garcia case itself, and its petition for writ of certiorari was denied." California v. Garcia, 105 S.Ct. 1229 (1985). The decision in Cabana makes even clearer

the correctness of the California Supreme Court's decision in this case.

D.

This Case is Not Appropriate for the Exercise of this Court's Certiorari Jurisdiction

Respondent notes that, in general, the question of whether state-law error is harmless is itself a state-law question. (See Connecticut v. Johnson, supra, at 88-89, Stevens, J. concurring.) Although Garcia relied on federal authority in reaching its conclusion that Carlos error is prejudicial, 36 Cal.3d at 555, n.10, this is not a case in which there is any persuasive need for review by this Court. Here the decision of the California Supreme Court was in support of federal constitutional principles, not in derogation thereof, so that the ordinary need for grant of review to ensure the supremacy of federal law does not exist. In such a situation, there are two reasons why this Court might still wish to grant review; neither are applicable here.

First, if the issue were a common one raising the prospect of establishing an ill-founded and widely-followed precedent, the Court might feel a responsibility to grant review to prevent that occurrence. But Carlos' reading of an intent requirement into California's felony-murder special circumstances and Garcia's application of that requirement to pending appeals is a unique state statutory development that is unlikely to have any significant implications for other state's laws.

Second, if the state court had concluded that the requirements of the federal constitution were undermining a significant state interest but had nevertheless ruled as it did out of a felt compulsion to comply with federal law, this Court might feel that it was appropriate to grant review in order to

liberate the state court from its misplaced reliance on federal authority. But the California court can hardly be said to have acted out of compulsion in its decisions in Carlos and Garcia. In Carlos it took an admittedly ambiguous statute (Carlos, supra, at 142-143) and chose to construe it to require intent to kill as an element of felony-murder special circumstances. In Garcia it then chose to apply the statute, as construed, retroactively to all pending appeals. (Garcia, supra 36 Cal.3d at 549) It is true that in deciding the standard of error the Garcia court found it useful to rely on federal authority, but it expressly left open the question of whether it would reach the identical result under the state law standard of error. Garcia, supra, at 551, n.7, and 555, n.10. Thus even if this Court were to grant review and ultimately reverse the judgment of the California Supreme Court, it is entirely likely that the state court would still reach the same conclusion as a matter of state law.

Under these circumstances, the exercise of this Court's review power would be unwarranted and inappropriate.

CONCLUSION

In California, a jury finding of intent to kill is required by state law and is not mandated by the federal constitutional considerations outlined in Enmund. Because the intent to kill determination is part of the guilt determination process and not the penalty phase of the trial, the California Supreme Court was correct in its application of the rule of Connecticut v. Johnson to the trial court's failure to instruct the jury that they must find "intent to kill" before they could find that the allegations of special circumstances were true. Accordingly, the petition for writ of certiorari should be

denied.

DATED: June 5, 1986

Respectfully submitted,

Barry Morris

BARRY L. MORRIS, Attorney for
Respondent BERNARD LEE HAMILTON

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1853

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

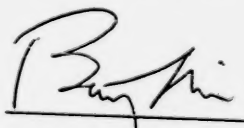
BERNARD LEE HAMILTON,

Respondent.

MOTION TO PROCEED IN FORMA PAUPERIS

Respondent, BERNARD LEE HAMILTON, by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Respondent has at all times during the pendency of the above-referenced matter in the trial and appellate courts of the State of California been represented by appointed counsel due to respondent's indigency. Respondent is presently incarcerated in San Quentin State Prison. His affidavit in support of this motion is attached.

DATED: June 5, 1986.



BARRY L. MORRIS, Attorney for

BERNARD LEE HAMILTON, Respondent

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. A-805

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BERNARD LEE HAMILTON,

Respondent.

DECLARATION OF
BERNARD LEE HAMILTON

I, BERNARD LEE HAMILTON, being duly sworn, depose and say in support of my motion for leave to proceed in forma pauperis:

1. I am the respondent in the above-entitled matter.

2. Because of my poverty I am unable to pay the costs of said cause; I own no real or personal property; I am presently incarcerated and have been since 1979; I receive no income from earnings and have nc cash or checking or savings accounts.

3. I am unable to to give security for said cause.

4. Counsel was appointed to represent me at trial, on my direct appeal, and on these post-appeal proceedings.

Bernard Lee Hamilton
BERNARD LEE HAMILTON

State of California)
) s.s.
County of Marin)

The foregoing affidavit of BERNARD LEE HAMILTON was subscribed and sworn to me this ___ day of May, 1986.

Notary Public

My commission expires:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1853

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

BERNARD LEE HAMILTON,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of the United States Supreme Court and that I have on this date served a copy of the Brief in Opposition and Motion to Proceed in Forma Pauperis, by depositing said brief in the United States Mail, postage prepaid and properly addressed to John K. Van de Kamp, Attorney General, Jay Bloom, Deputy Attorney General, 110 West "A" Street, Suite 700, San Diego, California 92101, and Clerk, California Supreme Couort, 4250 State Building, 455 Golden Gate Avenue, San Francisco, California 94102.

All parties required to be served have been served.

Dated this 5th day of June, 1986, at Oakland, California.

BARRY L. MORRIS, Attorney for
BERNARD LEE HAMILTON, Respondent